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No.

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1983

SAMUEL D. WEATHERS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS**

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QUESTION PRESENTED FOR REVIEW

- I. Whether the Petitioner, in being found guilty of murder, was denied due process of law where the expressed findings of the trial court are contradicted by the evidence?



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OPINION BELOW

The opinion of the Illinois Appellate Court is not reported (Illinois Supreme Court Rule 23) but is reproduced in the Appendix to this Petition (Appendix "A"). The opinion was entered on March 27, 1984. A timely Petition for Leave To Appeal was denied by the Illinois Supreme Court on June 5, 1984 (No. 59996, Appendix "B"). A prior opinion of the Illinois Appellate Court is reproduced as Appendix "C" and the original Motion for Relief (post-conviction petition) is reproduced as Appendix "D".

JURISDICTION

The Order of the Illinois Supreme Court denying leave to appeal was entered on June 5, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

STATUTES INVOLVED

Constitution Of The United States Of America

AMENDMENT 14 — CITIZENS OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATUTES

Chapter 38, §122-1, Illinois Revised Statutes

Article 122, POST CONVICTION HEARING

* * *

122-1 Petition in the trial court

§122-1. Petition in the trial court

Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of State of Illinois or both may institute a proceeding under this Article. The proceeding shall be commenced by filing with the Clerk of the court in which the conviction took place a petition (together with a copy thereof) verified affidavit. Petitioner shall also serve another copy upon the State's Attorney by any of the methods provided in Rule 7 of the Supreme Court. The Clerk shall docket the petition for consideration by the court pursuant to Section 122-2.1 upon his receipt thereof and bring the same promptly to the attention of the court. No proceedings under this Ar-

ticle shall be commenced more than 10 years after rendition of final judgment, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

Ch. 38 §9-1, Illinois Revised Statues

9-1. Murder—Death penalties—Exceptions—Separate hearings — Proof — Findings — Appellate procedures—Reversals

§ 9-1. Murder—Death penalties—Exceptions—Separate Hearings—Proof—Findings—Appellate procedures—Reversals. (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

* * *

Ch. 38, § 10-2, Aggravated Kidnaping

10-2. Aggravated kidnaping

§ 10-2. Aggravated kidnaping. (a) A kidnaper within the definition of paragraph (a) of Section 10-1 is guilty of the offense of aggravated kidnaping when he:

(1) Kidnaps for the purpose of obtaining ransom from the person kidnaped or from any other person, or

(2) Takes as his victim a child under the age of 13 years, or

(3) Inflicts great bodily harm or commits another felony upon his victim, or

- (4) Wears a hood, robe or mask or conceals his identity, or
- (5) Commits the offense of kidnaping while armed with a dangerous weapon, as defined in Section 33A-1 of the "Criminal Code of 1961".

As used in this Section, "ransom" includes money, benefit or other valuable thing or concession.

* * *

STATEMENT OF THE CASE

NATURE OF THE CASE

Defendant, Samuel D. Weathers, was charged in a five count indictment with the offenses of murder and aggravated kidnapping. (R. C32-39) Following a bench trial, Defendant was found guilty on all counts. On April 1, 1981, he was sentenced to the minimum penitentiary sentence of twenty years on the charge of murder and fifteen years on the charge of aggravated kidnapping, sentences to run concurrently. (R. C40) Defendant appealed his conviction which was affirmed by an Order Disposing of Appeal Under Supreme Court Rule 23 on February 24, 1982. (Appendix "E") No Petition for Rehearing was filed. Defendant submitted a Petition For Leave To Appeal in the Illinois Supreme Court which petition was denied. On August 10, 1982, Defendant filed a Motion For Relief Under Section 2-1401, Chapter 110 and Article 122, Chapter 38 Illinois Revised Statutes (Appendix "F"), which on August 8, 1982, the trial court dismissed without an evidentiary hearing. Defendant appealed to the Illinois Appellate Court which affirmed the trial court's order by an Order Disposing of Appeal Under Supreme Court Rule 23 issued on March 7, 1984. (Appendix "G") No Petition For Rehearing was filed. A timely Petition For

Leave To Appeal was filed with the Illinois Supreme Court which denied the Petition by Order entered June 5, 1984. (Appendix "H")

THE FACTS

On the morning of January 10, 1980, the decedent, Audrey J. Weathers, and her two children, Melva Elaine and Carla, exited their residence located at 10877 South Racine, Chicago, Illinois. Decedent and her children were residing with the decedent's mother and brother. On October 13, 1979, Audrey Weathers and Defendant, Samuel Weathers, had separated in their marriage. On January 10, 1980, decedent and Defendant had been married for sixteen (16) years. Melva Elaine, age 17 and Carla, age 16, also were Defendant's children. (R. 28-31)

After exiting the residence, decedent and the two children entered an adjacent parking lot and approached their vehicle, a two-door Firebird. Defendant emerged from the side of the building. (R. 37) In his hand he had a .38 automatic weapon. (R. 37, 126) Defendant ordered the decedent and the children to get into the car. (R. 38) Defendant told his family that he wanted them to come home with him to discuss certain family matters. (R. 285) Melva Elaine testified that Defendant did not verbally threaten her, her sister or mother with physical violence. (R. 59-60)

Defendant entered the vehicle from the back seat of the driver's side. The uncontroverted testimony indicated that Defendant was the first person to enter the vehicle. (R. 65, 152, 296) Carla and the decedent walked around to the front of the vehicle. The decedent entered from the passenger side and got in the back seat. Melva Elaine sat in the front driver seat. (R. 38, 64)

After entering the car, Defendant again stated that he wanted to take the family home. The decedent requested

Defendant to allow the children to go to school. Defendant acceded to this request. Melva Elaine drove the car out of the parking lot in the direction of 115th and Union Street. This was the location of the school bus stop. (R. 39) The testimony is controverted as to whether Defendant still had the .38 automatic in his hand or if he had placed the gun on the floor in the back seat. (R. 161, 298)

When they reached the bus stop, it was agreed that the children had missed the school bus. Defendant agreed to allow Melva Elaine to drive to the Elizabeth Seton High School which both girls attended. (R. 39) During the drive to the school, the decedent indicated that she and the children had been planning to visit Defendant that evening. (R. 79) Defendant again stated that he wanted the decedent to come home and discuss their marital problems.

Melva Elaine drove the car into the front parking lot near the entrance of the high school and parked the car. (A. 84) Both children got out of the car. (R. 87) At that time, Defendant informed the children that the decedent would pick them up from school at the usual place. (R. 39) Defendant testified that he so instructed the children to avoid interference from his in-laws during the anticipated conversation with his wife. (R. 307)

Carla Weathers testified that her mother exited the vehicle on the passenger side and Defendant exited the vehicle on the driver's side. At that time, Carla saw a weapon in Defendant's hand. Carla asked her mother whether she wanted Carla to call the police. Carla testified that her mother did not instruct her to call the police. (R. 160-161) Carla further testified that the Defendant indicated that he and decedent were going home after leaving the school. (R. 158)

Defendant testified that during the conversation between Carla and the decedent in the parking lot, he reached for his weapon on the floor in the back seat and put it in his pocket. Defendant got into the car on the driver's side because he was cold. The decedent remained outside of the car talking with Carla. (R. 368) Melva Elaine and Carla entered the school and the decedent re-entered the vehicle on the passenger side.

The evidence at trial showed that on January 10, 1980, the decedent was armed with a weapon. She was carrying a concealed derringer. (R. 49) Melva Weathers testified that decedent had owned the derringer for a couple of years and carried it with her "a majority of the time." (R. 50)

Defendant testified that he and the decedent left the school parking lot and traveled to the Calumet Expressway. Defendant and decedent discussed a divorce and the future education of the children. At this point, the decedent uncovered the derringer and shot Defendant in the face. Defendant veered off the expressway and stopped the car. Defendant pressed his feet against the door on the driver's side and slid over to the passenger side. Defendant was holding decedent's wrist to avoid being shot a second time. (R. 331) During this struggle inside the vehicle, the derringer again fired. Defendant and decedent fell out of the passenger side onto the ground. Defendant testified that he did not actually touch the derringer and did not know how the derringer was fired. (R. 312-313) Defendant then recalled that a man approached the vehicle and requested that Defendant hand over the .38 automatic weapon in his possession. Defendant did not recall how the .38 automatic got into his hand.

The State called Melanie Anewishki and John Siorek as occurrence witnesses. They offered significantly different versions of the events which took place on the highway.

Ms. Anewishki testified that on the date in question she was driving on the Calumet Expressway and observed a Firebird which had pulled off the highway and stopped. (R. 94-95) She said that she saw the Defendant exit the car on the driver's side and cross to the passenger side where he thrust his hands into the passenger side window. (R. 95-96) Anewishki further testified that she observed John Siorek running down the expressway towards her. (R. 96) She said that she approached the vehicle and saw the Defendant bleeding; he had a silver gun in his hand but it was not the derringer which caused Audrey Weathers' death. (R. 97-98) Anewishki testified that she ran past the Defendant to Audrey Weathers who was lying on the ground near the passenger's side of the vehicle. (R. 98) Anewishki said that she checked the woman's vital signs and concluded that Audrey was dead. (R. 100-101)

Anewishki's testimony, excluding certain statements made by Defendant, was in effect stricken by the trial court on the basis of State discovery abuse. (R. 4680)

John Siorek testified that because of mechanical difficulties, he had parked his truck on the side of the Calumet Expressway. (R. 255) Siorek said that he heard a "muffled pop" as the Firebird passed his truck on the expressway. (R. 255-256) He observed the brakes lock and the vehicle come to a sliding stop. (R. 256) He then approached the vehicle and saw Defendant on the passenger side and both Defendant and decedent engaged in a violent struggle. (R. 257) Siorek then heard the second pop. Subsequently, he observed a "chrome or shiny gun" in Defendant's hand. (R. 257) The State never elicited from Siorek whether the gun he saw was the derringer, the weapon which caused Audrey Weathers' death.

On cross-examination, Siorek unequivocally testified that Anewishki did not arrive until after the second shot occurred. (R. 259-260) Siorek never testified that he observed Defendant walk around the car to the passenger side and put his hands into the window. On cross-examination, Siorek repeated that when he heard the second pop, Defendant and decedent still were engaged in a violent struggle. (R. 262) Siorek's testimony was consistent with Defendant's version of the events set forth above.

State witness Ronald Blumenberg testified that he recovered a .38 automatic weapon from Defendant. Blumenberg later gave the weapon to the State Trooper who arrived at the scene. (R. 125-129)

Further testimony elicited by the defense indicated that Defendant had no prior criminal record. Defendant was employed full time as a truck driver. Twelve character witnesses testified on Defendant's behalf.

In his Motion for Relief Under Section 2-1401, Chapter 110 and Article 122, Chapter 38 Illinois Revised Statutes, (App. "I") Defendant maintained that he was found guilty of murder based upon incompetent testimony which amounted to the violation of his federal and Illinois constitutional right to confront witnesses. This contention was based upon several statements of the trial court which indicated that the Court had confused the testimonies of Siorek and Anewishki.

Both at trial and sentencing, the Court's comments revealed that it misunderstood Siorek's testimony. The Court believed Siorek testified that the struggle between the Weathers occurred outside of the vehicle and the decedent was shot outside the vehicle. The only testimony consistent with the Court's factual conclusions was that of Anewishki whose testimony the Court in effect struck.

Not realizing that Siorek's and Defendant's testimony were consistent, the Court concluded that Defendant had not told the truth and found him guilty of murder.

In his combined Section 2-1401 Motion and Post Conviction Petition, the Defendant further contended that in affirming his convictions the Appellate Court also found facts which had no basis in the record. (App. "I", par. 8)

In support of his Motion, Defendant further alleged that he had discovered new evidence in the form of an affidavit by Siorek. (App. "I", Exhibit "A": R. C61) which clarified Siorek's testimony at trial. In his Affidavit, Siorek stated that he observed a struggle inside a white Firebird; when he heard the second pop the man was outside of the vehicle, the woman was inside the vehicle and both still were struggling; Siorek never saw the man leave the auto from the driver's side to walk around to the passenger's side; the struggling with the hands never was interrupted; and it was entirely possible that the man could have fallen out of the passenger door during the struggle.

REASONS FOR GRANTING THE WRIT

It is fundamental that one's life and liberty are their most precious possessions and the Fourteenth Amendment to the Constitution guarantees citizens that they might not be deprived of their liberty without due process of law. Where the record demonstrates that a Defendant in a criminal case has been convicted on a basis other than the evidence at trial he has been denied his constitutional right.

ARGUMENT

The Petitioner, Samuel D. Weathers, moved for relief pursuant to Chapter 38, §122-1 et seq., Illinois Revised Statutes (Appendix "J", R.C. 54-60) alleging denial of his Federal and Illinois constitutional right to confront witnesses and due process of law and submitting new evidence in the form of an Affidavit. Defendant sought a hearing to determine the validity of his claims. On oral motion of the State to dismiss, the trial court dismissed the petition without an evidentiary hearing.

Defendant submits that the affidavit of John Siorek, (Appendix "I"; R. C61), presented a sufficient showing of the validity of Defendant's claims to warrant a hearing on the motion. Accordingly, the trial court erred when it granted the State's oral motion to dismiss and denied Defendant a hearing on his motion. The Appellate Court likewise erred in failing to consider this issue.

The Post-Conviction Hearing Act is intended to provide state prisoners with an effective post-trial procedure through which courts can determine whether or not substantial constitutional rights have been violated. *People*

v. *Graham*, 48 Ill.App.3d 689, 363 N.E.2d 124, 127 (1977). The function of the pleadings under that Act is to determine whether Petitioner is entitled to an evidentiary hearing. *Id.*, *People v. Wise*, 26 Ill.App.3d 158, 331 N.E.2d 302, 304 (1975). It is not the intention or purpose of the Post-Conviction Hearing Act that constitutional claims be adjudicated on the pleadings. *Id.* See: *People v. Johnson*, 52 Ill.App.3d 843, 368 N.E.2d 111, 113 (1977).

All well pleaded facts in a post-conviction petition and accompanying affidavits must be treated as admitted. *People v. Reed*, 84 Ill.App.3d 1030, 405 N.E.2d 1065, 1073 (1980). When the allegations and supporting documents are sufficient, if true, to warrant a fair inference of a constitutional violation, the trial court must hold a hearing to determine the actual facts. *People v. Cagle*, 68 Ill.App.3d 72, 385 N.E.2d 838, 839 (1979); *People v. Edmond*, 79 Ill.App.3d 33, 398 N.E.2d 230, 234 (1979). See: *People v. Sawyer*, 48 Ill.App.3d 127, 268 N.E.2d 689, 692 (1971). Failure to hold an evidentiary hearing under these circumstances is reversible error. *People v. Stephany*, 46 Ill. App.2d 153, 263 N.E.2d 83, 86 (1970); *People v. Shannon*, 28 Ill.App.3d 811, 329 N.E.2d 399, 405 (1975). This is so because fundamental fairness requires that a Defendant be entitled an opportunity to prove allegations set forth in a post-conviction petition which could establish a constitutional violation because, if proved, fundamental fairness, in turn, would require a new trial. *People v. Garrett*, 26 Ill.App.3d 786, 326 N.E.2d 143, 155 (1975).

As will be demonstrated below, the trial court committed reversible error when it denied Defendant's request for an evidentiary hearing in the present case.

In the Post-Conviction petition, Defendant maintained that the comments of the trial judge both at trial and sen-

tencing, indicated that he confused the testimonies of State occurrence witnesses Marie Anewishki and John Siorek. In discussing Siorek's testimony, upon which the court said it heavily relied, the court set forth Anewishki's version of the events. The affidavit of John Siorek submitted in support of the motion in question demonstrates a substantial likelihood that the trial court misunderstood Siorek's testimony. As a result of its confusion concerning the testimony of Siorek and Anewishki, the court concluded that Defendant had not testified truthfully and found him guilty of murder. In fact, Defendant had been convicted on the basis of incompetent evidence and thus denied due process of law.

Further, as also will be detailed below, in affirming Defendant's conviction the Appellate Court's order demonstrated that it necessarily relied upon the evidence which the trial court had in effect stricken. The Appellate Court's mistaken reliance upon incompetent evidence is apparent because there is no basis in the record for certain of the Appellate Court's conclusions of fact.

Moreover, when Defendant presented his Post conviction Petition to the trial court, the trial court's comments revealed that it still was laboring under a misapprehension of John Siorek's testimony. The Court's continued confusion concerning Siorek's testimony led it to deny Defendant's motion. Because Siorek's affidavit indicates a significant likelihood that the Court misunderstood his testimony, Defendant should have been granted a hearing at which Siorek could have testified and clarified precisely what occurred during the struggle between Defendant and Audrey Weathers which resulted in her death.

On direct examination, Melanie Anewishki testified that she was driving on the Calumet Expressway on the date

in question. (R. 94) She said that she observed a Firebird which had pulled off the highway and stopped. She testified that she saw a man whom she had identified as the Defendant, get out of the car on the driver's side and cross around to the passenger's side where he thrust his hands into the passenger side window. (R. 95-96) Anewishki further testified that she observed John Siorek running down the expressway toward her. (R. 96) Anewishki approached the vehicle and saw the Defendant bleeding. (R. 97) She observed that the Defendant had a silver gun in his hand but it was not the derringer which was the weapon causing Audrey Weathers' death. (R. 97-98) Anewishki ran past the Defendant to Audrey Weathers who was lying on the ground near the passenger side of the vehicle. (R. 98) She checked Audrey's vital signs and concluded that she was dead. (R. 100-101) This testimony of Ms. Anewishki, as noted above, was in effect stricken by the trial court on the basis of State discovery abuse. (R. 468)

Ms. Anewishki's testimony was flatly contradicted by John Siorek. Siorek testified that he heard a muffled pop as the Firebird passed his truck on the expressway. (R. 255-256) He observed the Firebird's brakes lock and the vehicle come to a sliding stop. He then approached the vehicle. (R. 256)

Contrary to Anewishki's testimony and *consistent* with the Defendant's testimony, Siorek observed a violent struggle occurring *inside* of the vehicle. (R. 257) He saw the Defendant on the passenger side and both the Defendant and Audrey Weathers were struggling. (R. 257) Subsequently, Siorek observed a chrome or shiny gun in the Defendant's hand. (R. 257) The State never elicited from Siorek whether the gun that he saw was the derringer.

On cross-examination Siorek unequivocally testified that Anewishki did not pull up until after the shooting. (R. 259-260) As a result, she simply could not have observed what she claims in her direct testimony to have observed. Siorek never testified that the Defendant got out of the car on the driver's side. He did not observe the Defendant put his hands in the window. Further, on cross-examination, Siorek repeated that when he heard the second pop, Audrey Weathers was inside of the car and she and Defendant were engaged in a violent struggle. (R. 262)

Consistent with Siorek's testimony, Defendant testified that while the car was moving along the expressway, decedent shot him in the right jaw. Defendant then stopped the car. (R. 310-312) A struggle ensued; Defendant attempted to get out of the car to avoid being shot again. (R. 334) To do this, Defendant pressed his feet against the driver's side door to get some leverage, opened the passenger's side door and partially fell out of the car. (R. 312) Defendant could not fall totally out of the vehicle because he and decedent still were struggling with their hands. (R. 313) After approximately 25 to 30 seconds, the derringer fired again; Defendant fell back out of the car and decedent fell out of the car with him. (R. 313)

Siorek's testimony was corroborated by Trooper Dixon, the Illinois State Police Officer who responded to an I.S.P.E.R.N. radio broadcast and arrived at the expressway shortly after decedent was shot. (R. 206-207) Trooper Dixon's description of what he saw at the scene supports the testimony of Siorek and Defendant that the decedent was shot while inside of the Firebird. Accordingly, Trooper Dixon's testimony contradicts the trial court conclusion that she was shot while outside of the vehicle.

Trooper Dixon testified that he saw decedent lying on her back adjacent to the car. (R. 209) He further testified that:

there were blood stains immediately right next to the passenger side door where the door was open. There were blood stains on the door of the vehicle, on the inside on the passenger side. There were (sic) also a large amount of blood on the interior of the car on the passenger side on the seat and on the floor board. (R. 209)

Trooper Dixon's description of the large amount of blood next to the passenger's side interior and passenger side door corroborates the fact that decedent was shot while still inside of the vehicle and she then fell out of that door which Defendant already had opened partially.

The trial court, however, found the Defendant guilty of murder based upon his recollection of Siorek's testimony. The Court found:

He [Siorek] said he saw *both* Weathers *outside* the passenger side of the automobile. He saw a shiny or silver weapon in the hand of Sam Weathers and he heard another pop. (R. 465-466; Emphasis added)

Contrary to the Court's recollection, Siorek's testimony indicated that the shooting occurred when Audrey Weathers was *inside* of the vehicle.

Furthermore, at the time of sentencing the judge repeated his confusion and indicated that where decedent was located when the second shot occurred was significant to his findings. The Court said:

“[T]here is just no way that the testimony of Siorek and the Defendant can be reconciled because Siorek says, in my judgment without contradiction, that Mrs. Weathers was shot *outside* the automobile.” (R. 489; emphasis added)

That the Court relied heavily on Siorek's testimony is apparent. The Court however, mistakenly believed that Siorek testified that the Defendant and Audrey Weathers both were outside the vehicle at the time of the shooting. As a result, the Court concluded that Defendant was not telling the truth. The only witness testifying to facts consistent with the Court's finding was Anewishki; and the Court had stricken her testimony. The court's confusion between Anewishki's and Siorek's testimonies resulted in a finding of murder based upon incompetent testimony.

The Defendant raised this issue of Defendant's conviction based upon incompetent testimony in the trial court and the court erroneously denied the post-trial motion. The Defendant also raised this issue in his direct appeal. The Rule 23 order issued by the appellate court, however, failed to address this issue and further compounded the error when the court relied upon facts which were stricken from the record:

We believe that the record showed that the deceased lawfully shot the Defendant who then stopped the car, wrested control of the weapon from the deceased and placed the gun against her head before firing the fatal shot. Defendant's conviction for murder was proper. (App. "J", Memorandum Opinion, p. 9)

While there is absolutely no evidence to support the proposition that the Defendant wrested the weapon from the deceased, it is apparent that to arrive at that factual conclusion the Appellate Court must have relied upon the stricken testimony of Ms. Anewishki.

As noted above, Defendant submitted new evidence in the form of an affidavit by John Siorek in support of his combined Section 2-1401 Motion and Post-Conviction Petition. The contents of Siorek's affidavit provided substan-

tial support to Defendant's claim that the trial court continually misunderstood Siorek's testimony.

Because of its importance, the portion of Siorek's affidavit describing the struggle on the highway bears quoting:

"As I approached the auto I observed a man and a woman struggling on the passenger's and driver's side of the auto. *The struggle occurred inside the vehicle.* I then saw the man outside of the auto still struggling when I heard a second pop. *The woman was still in the auto* and both the man and woman were still struggling with their hands. I never saw the man leave the auto from the driver's side to walk around to the passenger side. *The struggling with the hands was never interrupted.*

It is entirely possible that the man could have fallen out of the passenger door during this struggle. (R. C61; Emphasis added)

As is apparent from the face of the affidavit, Siorek's description of the events in question is significantly different from that version of the events to which the trial and appellate courts ascribed. Contrary to the trial court's rendition of the events, as discussed above, Siorek never stated that Audrey Weathers was outside of the vehicle when the second shot occurred. Moreover, even after reviewing Siorek's affidavit, the trial court still mistakenly believed that decedent was shot while outside of the Firebird:

I still find reading the affidavit . . . Siorek still says that at the time he approached . . . the vehicle in which Defendant and his wife were riding that . . . the Defendant was outside the vehicle *and so was Mrs. Weathers.* (R. 23; Emphasis added)

Furher, Siorek's affidavit cases additional severe doubt upon the validity of the appellate court's finding that De-

fendant "wrested control of the weapon from the deceased and placed the gun against her head before firing the fatal shot". (App. "I", p. 9)

In the present case, the trial court's reliance upon incompetent evidence was an error of fact which, if recognized and rectified, would have precluded Defendant's murder conviction. The Court's misunderstanding of Siorek's testimony was material to the issue of Defendant's guilt or innocence because this misunderstanding had a direct relationship to the Court's assessment of the credibility of Defendant who testified on his own behalf. A proper understanding of Siorek's testimony would have entitled Defendant to a finding of not guilty, or at most, a finding of voluntary or involuntary manslaughter, because of Siorek's affidavit recites the facts consistent with Defendant's testimony and directly contrary to the court's findings.

Further, a conviction based upon incompetent evidence amounts to a substantial denial of a Defendant's constitutional rights to confront witnesses and due process of law. The denial of the right of confrontation may be a proper basis for granting relief pursuant to Section 2-1401. *Cf., People v. Collins*, 51 Ill.App.3d 993, 367 N.E.2d 504 (1977). In the present case, Siorek's affidavit demonstrated a significant likelihood that Defendant's constitutional right of confrontation was violated.

For all of the above reasons, the trial court erred when it denied Defendant an evidentiary hearing on his Post-Conviction Petition.

CONCLUSION

For the foregoing reasons, the Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

.....
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Dated: August 3, 1984

APPENDIX

APPENDIX A

THIRD DIVISION

March 7, 1984

82-2722

IN THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

SAMUEL WEATHERS,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.

Honorable Dwight McKay, Judge Presiding.

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

Following a bench trial defendant was convicted of murder and aggravated kidnapping and sentenced to concurrent terms of 20 and 15 years respectively. On direct appeal this court affirmed pursuant to Supreme Court Rule 23 (*People v. Weathers* (1982), 104 Ill. App. 3d 1207), and the supreme court denied leave to appeal (91 Ill. 2d 565). Thereafter defendant filed a petition under section 2-1401 of the Code of Civil Procedure and the Post Conviction Hearing Act. (Ill. Rev. Stat. 1981, ch. 110, par. 2-1401, and ch. 38, par. 122-1 *et seq.*)¹ The trial court denied the peti-

¹ Defendant was released on bond at the time this petition was filed and apparently had not yet begun to serve his sentence. We question whether resort to post-conviction relief was therefore premature. Ill. Rev. Stat. 1981, ch. 38, par. 122-1; see generally the discussion in *People v. Montes* (1980), 90 Ill. App. 3d 355, 412 N.E.2d 1363.

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tion after a nonevidentiary hearing, and defendant has appealed challenging the trial court's ruling on that petition.

Defendant argues that he was entitled to an evidentiary hearing on his petition: defendant places principal reliance on the post-trial affidavit secured from John Siorek, a witness to the fatal shooting of defendant's wife.

Reference to certain facts contained in our prior dispositional order are necessary to resolution of defendant's contention. The evidence showed that defendant and his wife (deceased) were separated after defendant beat her. Approximately 40 days before the fatal shooting, defendant told one of his daughters that someone was going to be killed.

On the morning of January 10, 1980, defendant abducted deceased and their two daughters at gunpoint and drove the daughters to their school. He then drove away with deceased. It is undisputed that while defendant was driving, deceased pulled out her own small caliber two-shot pistol and fired one shot at defendant, striking him in the mouth. Defendant then suddenly braked the car and brought it to a stop on the shoulder of the road. A second fatal shot from deceased's gun was fired at this time into deceased's head while the gun was in contact with her head.

At this point John Siorek, who was also on the shoulder of the road because his vehicle was disabled, approached the car. In our Rule 23 disposition we described his other testimony as follows:

"As he approached the deceased's vehicle, he saw defendant and deceased struggling on the passenger side of the car. He then heard a second popping sound and saw defendant holding a gun. Defendant then backed away from the deceased, who was lying on the ground, and said, 'Damn.' "

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Another witness who arrived at the scene shortly after the shooting recalled that defendant said, "She shot me and I shot her." In affirming defendant's murder conviction, we concluded "that the record showed that the deceased lawfully shot the defendant who then stopped the car, wrested control of the weapon from the deceased and placed the gun against her head before firing the fatal shot."

In his collateral attack defendant questions the correctness of the trial court's ruling on his petition and our review of the record. Defendant refers to the trial court's factual evaluation that deceased was outside her car when she was shot as evidence of his claim that this was the basis upon which the trial court rejected his credibility. In an affidavit secured by defendant from John Siorek, he averred that defendant and deceased were struggling inside the car when the second shot was fired.²

Defendant also asserts that this court relied on the testimony of another witness, Melanie Anewishki. Though not recited in our prior dispositional order, she testified she saw defendant get out of the driver's side of the vehicle, go to the passenger's side and thrust his hands into the car. With the exception of a statement made by defendant to this witness, the trial court said that it "disregarded" her testimony. To this extent we only recited her testimony in general in order to set the context of defendant's statement to her. For defendant to suggest that this court relied inappropriately upon testimony not recited in our dispositional order is unwarranted. See *Gannon v. Chicago, Milwaukee, St. Paul and Pacific Railway Co.* (1961), 22 Ill. 2d 305, 316, 175 N.E.2d 785.

² Defendant admits that Siorek's trial testimony is not necessarily inconsistent with his affidavit.

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In any event we do not find any basis raised by Siorek's affidavit to disturb defendant's convictions. Irrespective of where deceased was shot our review of the record does not require a different result concerning defendant's guilt. We further believe that defendant's testimony concerning his lack of knowledge of how deceased was shot was incredulous particularly when defendant admitted shortly after the shooting that he had shot his wife after she had shot him. Defendant has basically combed the record for some point upon which to attack the totally justified finding of the trial court. While defendant may have found an evidentiary factor erroneously recited by the trial court, this factor was minor and does not dispel the compelling conclusion that defendant murdered his wife after she resisted him during the kidnapping. The trial court did not err in denying post-conviction or other collateral relief without an evidentiary hearing.

We affirm the judgment of the circuit court and grant the State's request that defendant be assessed \$50 as costs for this appeal.

McNAMARA, O'CONNOR, JR., WHITE, J.J.

APPENDIX B

No.

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Respondent,

v.

SAMUEL D. WEATHERS,

Defendant-Petitioner

Petition for Leave to Appeal From The Appellate Court
of Illinois, First District, Third Division.

There Heard on Appeal from the Circuit Court
of Cook County, Criminal Division.

The Honorable DWIGHT McKAY, Judge Presiding

PETITION FOR LEAVE TO APPEAL

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IN THE SUPREME COURT OF ILLINOIS

NO.

SAMUEL D. WEATHERS,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR LEAVE TO APPEAL
TO THE SUPREME COURT OF ILLINOIS

APPEAL FROM THE ILLINOIS APPELLATE COURT
FOR THE FIRST DISTRICT (THIRD DIVISION)
NO. 82-2722 APPELATE DECISION RENDERED BY
JUSTICES McNAMARA, O'CONNOR JR. and WHITE

I. PRAYER.

Petitioner SAMUEL D. WEATHERS respectfully requests this Honorable Court to grant his Petition for Leave to File an Appeal to the Supreme Court of Illinois and for such other and further relief as this Court deems necessary in the interests of justice.

II. ENTRY OF JUDGMENT

SAMUEL D. WEATHERS, pursuant to Rule 315 of the Supreme Court Rules, hereby petitions the Supreme Court of Illinois for leave to appeal the Order Disposing of Appeal Under Supreme Court Rule 23 of the Illinois Appellate Court for the First District, Third Division,

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entered on March 7, 1984. A Petition for Rehearing was not filed.

III. ISSUES FOR REVIEW

Whether the Appellate Court correctly affirmed the Circuit Court of Cook County's judgment granting the State's Motion to Dismiss Defendant's Combined Motion for New Trial and Post-Conviction where facts were in controversy?

IV. STATEMENT OF FACTS NATURE OF THE CASE

Defendant, SAMUEL WEATHERS, was charged in a five count indictment with the offenses of murder and aggravated kidnapping (R. C32-39). Following a bench trial, Defendant was found guilty on all counts. On April 1, 1981, he was sentenced to the minimum penitentiary sentence of twenty years on the charge of murder and fifteen years on the charge of aggravated kidnapping, sentences to run concurrently. (R. C40). Defendant appealed his conviction which was affirmed by an Order Disposing of Appeal Under Supreme Court Rule 23 on February 24, 1982. (App. "C"). No Petition for Rehearing was filed. Defendant submitted a Petition for Leave to Appeal to the Illinois Supreme Court which petition was denied. On August 10, 1982, Defendant filed a Motion For Relief Under Section 2-1401, Chapter 110 and Article 122, Chapter 38 Illinois Revised Statutes (App. "B"), which on August 18, 1982, the trial Court dismissed without an evidentiary hearing. Defendant appealed to the Illinois Appellate Court which affirmed the trial Court's order by an Order Disposing of Appeal Under Supreme Court Rule 23 issued on March 7, 1984 (App. "A"). No Petition for Rehearing was filed.

THE FACTS

On the morning of January 10, 1980, the decedent, Audrey J. Weathers, and her two children, Melva Elaine and Carla, exited their residence located at 10877 South Racine, Chicago, Illinois. Decedent and her children were residing with the decedent's mother and brother. On October 13, 1979, Audrey Weathers and Defendant, Samuel Weathers, had separated in their marriage. On January 10, 1980, decedent and Defendant has been married for sixteen years. Melva Elaine, age 17, and Carla, age 16, also were Defendant's children. (R. 28-31)

After exiting the residence, decedent and the two children entered an adjacent parking lot and approached their vehicle, a two-door Firebird. Defendant emerged from the side of the building. (R. 37) In his hand he had a .38 automatic weapon. (R. 37, 126) Defendant ordered the decedent and the children to get into the car. (R. 38) Defendant told his family that he wanted them to come home with him to discuss certain family matters. (R. 285) Melva Elaine testified that Defendant did not verbally threaten her, her sister or mother with physical violence. (R. 59-60)

Defendant entered the vehicle from the back seat of the driver's side. The uncontroverted testimony indicated that Defendant was the first person to enter the vehicle. (R. 65, 152, 296) Carla and the decedent walked around to the front of the vehicle. The decedent entered from the passenger side and got in the back seat. Melva Elaine sat in the front driver seat. (R. 38, 64)

After entering the car, Defendant again stated that he wanted to take the family home. The decedent requested Defendant to allow the children to go to school. Defendant acceded to this request. Melva Elaine drove the car

out of the parking lot in the direction of 115th and Union Street. This was the location of the school bus stop. (R. 39) The testimony is controverted as to whether Defendant still had the .38 automatic in his hand or if he had placed the gun on the floor in the back seat. (R. 161, 298)

When they reached the bus stop, it was agreed that the children had missed the school bus. Defendant agreed to allow Melva Elaine to drive to the Elizabeth Seton High School which both girls attended. (R. 39) During the drive to the school, the decedent indicated that she and the children had been planning to visit Defendant that evening. (R. 79) Defendant again stated that he wanted the decedent to come home and discuss their marital problems.

Melva Elaine drove the car into the front parking lot near the entrance of the high school and parked the car. (R. 84) Both children got out of the car. (R. 87) At that time, Defendant informed the children that the decedent would pick them up from school at the usual place. (R. 39) Defendant testified that he so instructed the children to avoid interference from his in-laws during the anticipated conversation with his wife. (R. 307)

Carla Weathers testified that her mother exited the vehicle on the passenger side and Defendant exited the vehicle on the driver's side. At that time, Carla saw a weapon in Defendant's hand. Carla asked her mother whether she wanted Carla to call the police. Carla testified that her mother did not instruct her to call the police. (R. 160-161) Carla further testified that the Defendant indicated that he and decedent were going home after leaving the school. (R. 158)

Defendant testified that during the conversation between Carla and the decedent in the parking lot, he reached for his weapon on the floor in the back seat and put it in his pocket. Defendant got into the car on the driver's side

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because he was cold. The decedent remained outside of the car talking with Carla. (R. 368) Melva Elaine and Carla entered the school and the decedent re-entered the vehicle on the passenger side.

The evidence at trial showed that on January 10, 1980, the decedent was armed with a weapon. She was carrying a concealed derringer. (R. 49) Melva Weathers testified that decedent had owned the derringer for a couple of years and carried it with her "a majority of the time." (R. 50)

Defendant testified that he and the decedent left the school parking lot and traveled to the Calumet Expressway. Defendant and decedent discussed a divorce and the future education of the children. At this point, the decedent uncovered the derringer and shot Defendant in the face. Defendant veered off the expressway and stopped the car. Defendant pressed his feet against the door on the driver's side and slid over to the passenger side. Defendant was holding decedent's wrist to avoid being shot a second time. (R. 331) During this struggle inside the vehicle, the derringer again fired. Defendant and decedent fell out of the passenger side onto the ground. Defendant testified that he did not actually touch the derringer and did not know how the derringer was fired. (R. 312-313) Defendant then recalled that a man approached the vehicle and requested that Defendant hand over the .38 automatic weapon in his possession. Defendant did not recall how the .38 automatic got into his hand.

The State called Melanie Anewishki and John Siorek as occurrence witnesses. They offered significantly different versions of the events which took place on the highway.

Ms. Anewishki testified that on the date in question she was driving on the Calumet Expressway and observed a Firebird which had pulled off the highway and stopped.

(R. 94-85) She said that she saw the Defendant exit the car on the driver's side and cross to the passenger side where he thrust his hands into the passenger side window. (R. 95-96) Anewishki further testified that she observed John Siorek running down the expressway towards her. (R. 96) She said that she approached the vehicle and saw the Defendant bleeding; he had a silver gun in his hand but it was not the derringer which caused Audrey Weathers' death. (R. 97-98) Anewishki testified that she ran past the Defendant to Audrey Weathers who was lying on the ground near the passenger's side of the vehicle. (R. 98) Anewishki said that she checked the woman's vital signs and concluded that Audrey was dead. (R. 100-101)

Anewishki's testimony, excluding certain statements made by Defendant, was in effect stricken by the trial court on the basis of State discovery abuse. (R. 4680)

John Siorek testified that because of mechanical difficulties, he had parked his truck on the side of the Calumet Expressway. (R. 255) Siorek said that he heard a "muffled pop" as the Firebird passed his truck on the expressway. (R. 255-256) He observed the brakes lock and the vehicle come to a sliding stop. (R. 256) He then approached the vehicle and saw Defendant on the passenger side and both Defendant and decedent engaged in a violent struggle. (R. 257) Siorek then heard the second pop. Subsequently, he observed a "chrome or shiny gun" in Defendant's hand. (R. 257) The State never elicited from Siorek whether the gun he saw was the derringer, the weapon which caused Audre Weathers' death.

On cross-examination, Siorek unequivocally testified that Anewishki did not arrive until after the second shot occurred. (R. 259-260) Siorek never testified that he observed Defendant walk around the car to the passenger side and put his hands into the window. On cross-examination,

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Siorek repeated that when he heard the second pop, Defendant and decedent still were engaged in a violent struggle. (R. 262) Siorek's testimony was consistent with Defendant's version of the events set forth above.

State witness Ronald Blumenberg testified that he recovered a .38 automatic weapon from Defendant. Blumenberg later gave the weapon to the State Trooper who arrived at the scene. (R. 125-129)

Further testimony elicited by the defense indicated that Defendant had no prior criminal record. Defendant was employed full time as a truck driver. Twelve character witnesses testified on Defendant's behalf.

In his Motion for Relief Under Section 2-1401, Chapter 110 and Article 122, Chapter 38 Illinois Revised Statutes, (App. "B") Defendant maintained that he was found guilty of murder based upon incompetent testimony which amounted to the violation of his federal and Illinois constitutional right to confront witnesses. This contention was based upon several statements of the trial court which indicated that the Court had confused the testimonies of Siorek and Anewishki.

Both at trial and sentencing, the Court's comments revealed that it misunderstood Siorek's testimony. The Court believed Siorek testified that the struggle between the Weathers occurred outside of the vehicle and the decedent was shot outside the vehicle. The only testimony consistent with the Court's factual conclusions was that of Anewishki whose testimony the Court in effect struck. Not realizing that Siorek's and Defendant's testimony were consistent, the Court concluded that Defendant had not told the truth and found him guilty of murder.

In his combined Section 2-1401 Motion and Post Conviction Petition, the Defendant further contended that in af-

firming his convictions the Appellate Court also found facts which had no basis in the record. (App. "B", par. 8)

In support of his Motion, Defendant further alleged that he had discovered new evidence in the form of an affidavit by Siorek. (App. "B", Exhibit "A"; R. C61) which clarified Siorek's testimony at trial. In his Affidavit, Siorek stated that he observed a struggle inside a white Firebird; when he heard the second pop the man was outside of the vehicle, the woman was inside the vehicle and both still were struggling; Siorek never saw the man leave the auto from the driver's side to walk around to the passenger's side; the struggling with the hands never was interrupted; and it was entirely possible that the man could have fallen out of the passenger door during the struggle.

V. ARGUMENT

THE TRIAL COURT IMPROPERLY DISMISSED DEFENDANT'S COMBINED SECTION 2-1401 MOTION AND POST CONVICTION PETITION WHERE THERE WERE CONTESTED FACTS AND THE APPELLATE COURT FAILED TO ADDRESS THE ISSUE

The Defendant, SAMUEL WEATHERS, moved for relief pursuant to Chapter 110, §2-1401 and Chapter 38, §122-1 et seq., Illinois Revised Statutes (App. "B", R.C. 54-60) alleging denial of his federal and Illinois constitutional right to confront witnesses and submitting new evidence in the form of an Affidavit. Defendant sought a hearing to determine the validity of his claims. On oral motion of the State to dismiss, the trial court dismissed the petition without an evidentiary hearing.

Defendant submits that the affidavit of John Siorek (App. "B", Exhibit "A"; R. C61) presented a sufficient showing of the validity of Defendant's claims to warrant a hearing on the motion. Accordingly, the trial court erred

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when it granted the State's oral motion to dismiss and denied Defendant a hearing on his motion. The Appellate Court likewise erred in failing to consider this issue.

Petitions under the Civil Practice Act to set aside convictions are addressed to equitable powers of the Court as justice and fairness require. *People v. Martinez*, 14 Ill. App.3d 775, 303 N.E.2d 442 (1973) (abstract op.) Where the facts of a Section 2-1401 motion are controverted, a full and orderly evidentiary hearing must be held by the Court. *People v. Reed*, 84 Ill.App.3d 1030, 405 N.E.2d 1065, 1073(1980); *Mercantile All-In-One Loans, Inc. v. Menna*, 63 Ill.App.3d 931, 380 N.E.2d 944, 950(1978). Accord: *In re Marriage of Lorenzi*, 84 Ill.App.3d 427, 405 N.E.2d 507, 511; *McKinnon v. Yellow Cab Co.*, 31 Ill.App.3d 316, 333 N.E.2d 659(1975); *Wilson v. Wilson*, 56 Ill. App.2d 187, 205 N.E.2d 636(1965).

The Post-Conviction Hearing Act is intended to provide state prisoners with an effective post-trial procedure through which courts can determine whether or not substantial constitutional rights have been violated. *People v. Graham*, 48 Ill.App.3d 689, 363 N.E.2d 124, 127 (1978). The function of the pleadings under that Act is to determine whether Petitioner is entitled to an evidentiary hearing. *Id.*, *People v. Wise*, 26 Ill.App.3d 158, 331 N.E.2d 302, 304(1975). It is not the intention or purpose of the Post-Conviction Hearing Act that constitutional claims be adjudicated on the pleadings. *Id. See: People v. Johnson*, 52 Ill.App.3d 843, 368 N.E.2d 111, 113 (1977).

All well pleaded facts in a post-conviction petition and accompanying affidavits must be treated as admitted. *People v. Reed*, 84 Ill.App.3d 1030, 405 N.E.2d 1065, 1073 (1980). When the allegations and supporting documents are sufficient, if true, to warrant a fair inference of a constitutional violation, the trial court must hold a hear-

ing to determine the actual facts. *People v. Cagle*, 68 Ill. App.3d 72, 385 N.E.2d 838, 839(1979); *People v. Edmond*, 79 Ill.App.3d 33, 398 N.E.2d 230, 234 (1979). See: *People v. Sawyer*, 48 Ill.App.3d 127, 268 N.E.2d 689, 692(1971). Failure to hold an evidentiary hearing under these circumstances is reversible error. *People v. Stephany*, 46 Ill.App. 2d 153, 263 N.E.2d 83, 86(1970); *People v. Shannon*, 28 Ill.App.3d 811, 329 N.E.2d 399, 405(1975). This is so because fundamental fairness requires that a Defendant be entitled an opportunity to prove allegations set forth in a post-conviction petition which could establish a constitutional violation because, if proved, fundamental fairness, in turn, would require a new trial. *People v. Garrett*, 26 Ill.App.3 786 326 N.E.2d 143, 155(1975).

As will be demonstrated below, the trial court committed reversible error when it denied Defendant's request for an evidentiary hearing in the present case.

In this combined Section 2-1401 Motion and Post-Conviction petition, Defendant maintained that the comments of the trial judge both at trial and sentencing indicated that he confused the testimonies of State occurrence witnesses Marie Anewishki and John Siorek. In discussing Siorek's testimony, upon which the Court said it heavily relied, the Court set forth Anewishki's version of the events. The affidavit of John Siorek submitted in support of the motion in question demonstrates a substantial likelihood that the trial court misunderstood Siorek's testimony. As a result of its confusion concerning the testimony of Siorek and Anewishki, the court concluded that Defendant had not testified truthfully and found him guilty of murder. In fact, Defendant had been convicted on the basis of incompetent evidence.

Further, as also will be detailed below, in affirming Defendant's conviction the Appellate Court's order demonstrated that it necessarily relied upon evidence which

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the trial court had is effect stricken. The Appellate Court's mistaken reliance upon incompetent evidence is apparent because there is not basis in the record for certain of the Appellate Court's conclusion of fact.

Moreover, when Defendant presented his combined Section 2-1401 Motion and Post-Conviction Petition to the trial court, the trial court's comments revealed that it still was laboring under a misapprehension of John Siorek's testimony. The Court's continued confusion concerning Siorek's testimony led it to deny Defendant's motion. Because Siorek's affidavit indicates a significant likelihood that the Court misunderstood his testimony, Defendant should have been granted a hearing at which Siorek could have testified and clarified precisely what occurred during the struggle between Defendant and Audrey Weathers which resulted in her death.

On direct examination, Melanie Anewishki testified that she was driving on the Calumet Expressway on the date in question. (R. 94) She said that she observed a Firebird which had pulled off the highway and stopped. She testified that she saw a man whom she had identified as the Defendant, get out of the car on the driver's side and cross around to the passenger's side where he thrust his hands into the passenger side window. (R. 95-96) Anewishki further testified that she observed John Siorek running down the expressway toward her. (R. 96) Anewishki approached the vehicle and saw the Defendant bleeding. (R. 97) She observed that the Defendant had a silver gun in his hand but it was not the derringer which was the weapon causing Audrey Weathers' death. (R. 97-98) Anewishki ran past the Defendant to Audrey Weathers who was lying on the ground near the passenger side of the vehicle. (R. 98) She checked Audrey's vital signs and concluded that she was dead. (R. 100-101) This testimony

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of Ms. Anewishki, as noted above, was in effect stricken by the trial court on the basis of State discovery abuse. (R. 468)

Ms. Anewishki's testimony was flatly contradicted by John Siorek. Siorek testified that he hear a muffled pop as the Firebird passed his truck on the expressway. (R. 255-256) He observed the Firebird's brakes lock and the vehicle come to a sliding stop. He then approached the vehicle. (R. 256)

Contrary to Anewishki's testimony and *consistent* with the Defendant's testimony, Siorek observed a violent struggle occurring *inside* of the vehicle. (R. 257) He saw the Defendant on the passenger side and both the Defendant and Audrey Weathers were struggling. (R. 257) Subsequently, Siorek observed a chrome or shiny gun in the Defendant's hand (R. 257) The State never elicited from Siorek whether the gun that he saw the the derringer.

On cross-examination, Siorek unequivocally testified that Anewishki did not pull up until after the shooting. (R. 259-260) As a result, she simply could not have observed what she claims in her direct testimony to have observed. Siorek never testified that the Defendant got out of the car on the driver's side. He did not observe the Defendant put his hand in the window. Further, on cross-examination, Siorek repeated that when he heard the second pop, Audrey Weathers was inside of the car and she and Defendant were engaged in a violent struggle, (R. 262)

Consistent with Siorek's testimony, Defendant testified that while the car was moving along the expressway, defendant shot him in the right jaw. Defendant then stopped the car. (R. 310-312) A struggle ensued; Defendant attempted to get out of the car to avoid being shot again. (R. 334)

To so this, Defendant pressed his feet against the driver's side door to get some leverage, opened the passenger's side door and partially fell out of the car. (R. 312) Defendant could not fall totally out of the vehicle because he and decedent still were struggling with their hands (R. 313) After approximately 25 to 30 seconds, the derringer fired again; Defendant fell back out of the car and decedent fell out of the car with him. (R. 313)

Siorek's testimony was corroborated by Trooper Dixon, the Illinois State Police Officer who responded to an I.S.P.E.R.N. radio broadcast and arrived at the expressway shortly after decedent was shot. (R. 206-207) Trooper Dixon's description of what he saw at the scene supports the testimony of Siorek and Defendant that the decedent was shot while inside of the Firebird. Accordingly, Trooper Dixon's testimony contradicts the trial court's conclusion that she was shot while outside of the vehicle.

Trooper Dixon testified that he saw decedent lying on her back adjacent to the car. (R. 209) He further testified that:

there were blood stains immediately right next to the passenger side door where the door was open. There were blood stains on the door of the vehicle, on the inside on the passenger side. There were (sic) also a large amount of blood on the interior of the car on the passenger side on the seat and on the floor board. (R. 209)

Trooper Dixon's description of the large amount of blood next to the passenger's side interior and passenger side door corroborates the fact that decedent was shot while still inside of the vehicle and she then fell out of that door which Defendant already had opened partially.

The trial court, however, found the Defendant guilty of murder based upon his recollection of Siorek's testimony. The Court found:

He [Siorek] said he saw *both* Weathers *outside* the passenger side of the automobile. He saw a shiny or silver weapon in the hand of Sam Weathers and he heard another pop. (R. 465-466; Emphasis added)

Contrary to the Court's recollection, Siorek's testimony indicated that the shooting occurred when Audrey Weathers was *inside* of the vehicle.

Furthermore, at the time of sentencing the judge repeated his confusion and indicated that where decedent was located when the second shot occurred was significant to his findings. The Court said:

"[T]here is just no way that the testimony of Siorek and the Defendant can be reconciled because Siorek says, in my judgment without contradiction, that Mrs. Weathers was shot *outside* the automobile." (R. 498; emphasis added)

That the Court relied heavily on Siorek's testimony is apparent. The Court however, mistakenly believed that Siorek testified that the Defendant and Audrey Weathers both were outside the vehicle at the time of the shooting. As a result, the Court concluded that Defendant was not telling the truth. The only witness testifying to facts consistent with the Court's finding was Anewishki; and the Court had stricken her testimony. The court's confusion between Anewishki's and Siorek's testimonies resulted in a finding of murder based upon incompetent testimony.

The Defendant raised this issue of Defendant's conviction based upon incompetent testimony in the trial court and the court erroneously denied the post-trial motion. The Defendant also raised this issue in his direct appeal. The Rule 23 order issued by the appellate court, however, failed to address this issue and further compounded the error when the court relied upon facts which were stricken from the record:

We believe that the record showed that the deceased lawfully shot the Defendant who then stopped the car, wrested control of the weapon from the deceased and placed the gun against her head before firing the fatal shot. Defendant's conviction for murder was proper. (App. "C", Memorandum Opinion, p. 9)

While there is absolutely no evidence to support the proposition that the Defendant wrested the weapon from the deceased, it is apparent that to arrive at that factual conclusion the Appellate Court must have relied upon the stricken testimony of Ms. Anewishki.

As noted above, Defendant submitted new evidence in the form of an affidavit by John Siorek in support of his combined Section 2-1401 Motion and Post-Conviction Petition. The contents of Siorek's affidavit provided substantial support to Defendant's claim that the trial court continually misunderstood Siorek's testimony.

Because of its importance, the portion of Siorek's affidavit describing the struggle on the highway bears quoting:

"As I approached the auto I observed a man and a woman struggling on the passenger's and driver's side of the auto. *The struggle occurred inside the vehicle.* I then saw the man outside of the auto still struggling when I heard a second pop. *The woman was still in the auto* and both the man and woman were still struggling with their hands. I never saw the man leave the auto from the driver's side to walk around to the passenger side. *The struggling with the hands was never interrupted.*

It is entirely possible that the man could have fallen out of the passenger door during this struggle. (R. C61; Emphasis added)

As is apparent from the face of the affidavit, Siorek's description of the events in question is significantly different from that version of the events to which the trial

and appellate courts ascribed. Contrary to the trial court's rendition of the events, as discussed above, Siorek never stated that Audrey Weathers was outside of the vehicle when the second shot occurred. Moreover, even after reviewing Siorek's affidavit, the trial court still mistakenly believed that decedent was shot while outside of the Firebird:

I still find reading the affidavit . . . Siorek still says that at the time he approached . . . the vehicle in which Defendant and his wife were riding that . . . the Defendant was outside the vehicle *and so was Mrs. Weathers*. (R. 23; Emphasis added)

Further, Siorek's affidavit casts additional severe doubt upon the validity of the appellate court's find that Defendant "wrested control of the weapon from the deceased and placed the gun against her head before firing the fatal shot". (App. "I", p. 9)

Section 72 of the Civil Practice Act [now Sections 2-1401] provides an avenue to challenge judgments and orders rendered in ignorance of existing facts, which if known, would preclude entry of the original disposition. *People v. Johnson*, 97 Ill.App.3d 976, 424 N.E.2d 12, 14(1981). In the present case, the court's reliance upon incompetent evidence was an error of fact which, if recognized and rectified, would have precluded Defendant's murder conviction. The Court's misunderstanding of Siorek's testimony was material to the issue of Defendant's guilt or innocence because this misunderstanding had a direct relationship to the Court's assessment of the credibility of Defendant who testified on his own behalf. A proper understanding of Siorek's testimony would have entitled Defendant to a finding of not guilty, or at most, a finding of voluntary or involuntary manslaughter, because of Siorek's affidavit recites the facts consistent with Defendant's testimony and directly contrary to the court's findings.

Further, a conviction based upon incompetent evidence amounts to a substantial denial of a Defendant's constitutional rights to confront witnesses. The denial of the right of confrontation may be a proper basis for granting relief pursuant to Section 2-1401. *Cf., People v. Collins*, 51 Ill.App.3d 993, 367 N.E.2d 504(1977). In the present case, Siorek's affidavit demonstrated a significant likelihood that Defendant's constitutional right of confrontation was violated.

For all of the above reasons, the trial court erred when it denied Defendant as evidentiary hearing on his combined Section 2-1401 Motion and Post-Conviction Petition.

CONCLUSION

For the foregoing reasons, Petitioner, SAMUEL WEATHERS, prays this Court to grant him leave to appeal to this Court from the judgment of the Illinois Appellate Court, First District.

Respectfully submitted,

/s/ Carl M. Walsh

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Date: April 11, 1984

CERTIFICATE OF SERVICE

I, CARL M. WALSH, certify that I served three (3) copies of the foregoing Petition for Leave to Appeal upon the following:

RICHARD M. DALEY,
States Attorney of
Cook County
Room 500
Richard J. Daley Center
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NEIL HARTIGAN
Attorney General of
Illinois
188 West Randolph Street
Chicago, Illinois 60601

by placing said copies in envelopes with proper prepaid postage affixed and addressed as above and placing same with the U.S. Post Office at 39 South LaSalle Street, Chicago, Illinois 60603, this 11th day of April, 1984.

/s/ *Carl M. Walsh*
CARL M. WALSH

App. 24

APPENDIX C

Third Division Filed 2-24-82

81-797

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

SAMUEL D. WEATHERS,

Defendant Appellant.

Appeal from the Circuit Court of Cook County.
Honorable Dwight McKay, Judge Presiding.

**ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23**

Following a bench trial defendant was convicted of murder and aggravated kidnapping (Ill. Rev. Stat. 1979, ch. 38, pars. 9-1 and 10-3(a)(5)) and received concurrent sentences of 20 and 15 years respectively. On appeal he contends that he was not proved guilty beyond a reasonable doubt of either offense.

The incident in question occurred at approximately 8 a.m. on January 10, 1980. The deceased, Audrey Weathers, had been married for approximately 16 years to defendant. They had 2 teen-age daughters. Extreme marital discord developed over bills, taxes, deceased's job and defendant's drinking, and on the evening of October 13, 1979, a physical altercation occurred between deceased and defendant. As a result of this altercation, the deceased was extensively

beaten by defendant, and she required stitches to close a laceration over one eye. The deceased and the daughters then left the marital home. One daughter related an incident at trial concerning events which occurred on December 1, 1979. She was in a car going to a church when defendant drove by in his vehicle and forced the car to stop. Defendant then dragged her from the car and ordered her to return to the marital home. Defendant left the area as the police arrived, but before he did so he told her that there was going to be a killing.

Both the teen-age daughters testified for the State at trial and described the events shortly before their mother was fatally shot. They explained that the deceased was going to give them a ride to a bus stop where they would then get transportation to their high school. As they exited the house, they were suddenly approached by the defendant who was carrying a gun which was pointed at them. Defendant ordered the deceased and the daughters into the car. Defendant and deceased were in the back seat while the older daughter drove and the other remained in the front passenger seat. During the drive the defendant held the gun toward deceased and behaved in a hysterical manner. Since they could not reach the bus stop in time, the deceased suggested that the girls drive to the high school. There they left the car with the admonition of the defendant that they not report the matter to anyone. Defendant then got into the front seat of the car and drove away with deceased who had gotten into the front passenger seat.

Other witnesses for the State established the following scenario of events after the daughters went into the school. Defendant drove the deceased's vehicle onto an expressway. A truck driver, who was parked on the side of the roadway attending his disabled vehicle, saw the car drive past and heard a muffled pop. He then saw the car brake

suddenly and come to a stop. As he approached the deceased's vehicle, he saw defendant and deceased struggling on the passenger side of the car. He then heard a second popping sound and saw defendant holding a gun. Defendant then backed away from the deceased, who was lying on the ground, and said, "Damn."

Another motorist on the expressway noted a peculiarity in the traffic pattern and saw the deceased's vehicle. She stopped her car, got out and saw the deceased lying on the ground. At that time she also saw the defendant who was bleeding from the right part of his jaw. Defendant was holding a gun which he later threw to the ground. He appeared agitated. This witness examined the deceased and was unable to detect any signs of life. The witness specifically recalled that at this time the defendant said, "Good, the bitch is dead." This witness was, however, uncertain whether the defendant then continued by stating, "She needs to be dead."

Another motorist, who was a federal probation officer, stopped at the scene of the shooting. He saw the deceased lying on the ground, and he later took a .38-caliber automatic pistol from the defendant. An investigating police officer arrived at the scene shortly after the incident occurred. He saw defendant and apparently the probation officer near a guard rail. Defendant told this officer, "She shot me and I shot her." At this point defendant was arrested. A state trooper, who also arrived at the scene, testified that she saw the deceased lying on the ground and bloodstains in the car. A 22-caliber derringer was laying on the ground near the deceased's head. One live round of .38-caliber ammunition was also found on the ground nearby. The trooper then saw the defendant in handcuffs with another police officer who was administering aid to the defendant. This trooper was given defendant's .38-caliber automatic pistol.

There was a stipulation concerning the fact that the deceased had died from a gunshot wound to the brain and that the entry wound was of a contact nature indicating that the gun was right to her head when it was fired. There was a further stipulation that the fatal bullet was fired from the .22-caliber derringer recovered from the scene of the shooting. The weapon at that time contained 2 expended shells. The record further shows that this weapon belonged to deceased and she apparently had it in her possession on the morning of the shooting.

Defendant testified in his own behalf indicating that after deceased left in October 1979, he received notice of substantial bills which were owing to the Internal Revenue Service and various merchandisers. A sum of money in their joint account had apparently also been withdrawn. On the day of the incident defendant said that he went to see the deceased and his children to tell them that they should come back home. Defendant had the .38-caliber automatic pistol in his possession since he had taken it out of his truck the night before after completion of his job and apparently had kept a weapon in his pocket without removing it. Defendant admitted that at the time he encountered the deceased and his children he had the weapon in his hand, although he was not pointing it at them. When they then got into deceased's car, defendant claimed that he put the gun on the floor and continued to talk with deceased as one daughter drove toward the school. When they reached the school, defendant got out and got into the driver's seat. Deceased, who had also exited the car, then reentered and they drove off. Defendant explained that his purpose for the drive was to discuss certain matters with the deceased because it appeared inevitable that a divorce would occur, and he wanted to talk about certain property settlement arrangements. Defendant claimed that he was speaking to the deceased about the college his daughters

would attend when deceased without warning shot him in the jaw with the derringer, and he stopped the car. At that point a struggle ensued in the vehicle, and defendant claimed that he fell partially out of the deceased's car. The gun then again discharged. Defendant denied ever having the derringer in his hand. Rather, he said that the deceased held the gun. Defendant claimed that he did not intend to kill the deceased or to kidnap her or his children. Defendant was unable to explain how the derringer went off the second time.

In announcing its findings, the trial court concluded that defendant had kidnapped the deceased and his children. The court further found that the deceased had a right, as a hostage, to shoot the defendant. Further, the trial court stated that it did not give any credence to defendant's testimony concerning the tragic events, and the court concluded that the defendant had murdered the deceased with her own weapon.

Defendant now contends that these conclusions were erroneous. Defendant initially maintains that there was a lack of evidence that the deceased had been kidnapped. Specifically, defendant asserts that the evidence is insufficient to show that she was confined against her will, and secondly that that confinement was secret. He maintains that initially he may have committed an aggravated assault but that at some subsequent time deceased voluntarily agreed to accompany him. If his conclusion is correct, defendant argues that a felony-murder conviction based on aggravated kidnapping could not be proper.¹

¹ Defendant was charged with 2 counts of murder (Ill. Rev. Stat. 1979, ch. 38, pars. 9-1(a)(1) and 9-1(a)(2) and one count of felony-murder, based on aggravated kidnapping (par. 9-1(a)(3)). It is unclear of what count(s) the trial court convicted defendant.

The trial court obviously believed the testimony of the defendant's teen-aged daughters which established that the defendant accosted them with a gun that he pointed at them and that he then ordered them into the deceased's car. While in the car, the defendant held the weapon pointed at the deceased. We reject the defendant's position that the deceased did not attempt to escape when they first entered the car or when their daughters arrived at school thereby suggesting that her continued presence with defendant was voluntary. She was confronted by the defendant who, in the recent past, had exhibited violent behavior not only toward her but to one of their children. Defendant was armed, and it is obvious that the deceased wanted to safeguard her children by having them reach school without the possibility of violence being inflicted upon them by defendant. The fact that the deceased waited until her children were safe before she shot the defendant further supports our conclusion that any resistance or attempt to escape on the part of the deceased prior thereto was done to safeguard her daughters. The evidence amply demonstrates that the deceased was confined against her will. (See *People v. Owens* (1971), 133 Ill. App. 2d 44, 47, 272 N.E.2d 858.) Further, the fact that the deceased was confined in an automobile does not detract from the conclusion that such confinement was secret. *People v. Harris* (1979), 68 Ill. App. 3d 12, 14, 385 N.E. 2d 789.

Defendant also states the asportation of the deceased was not relevant to the shooting because the trial court concluded that the abduction of the deceased and the children prior to their arrival at school was not crucial. Defendant contends that, after the children were let out of the vehicle, the deceased agreed to accompany him. Thus, defendant maintains that the aggravated kidnapping conviction was improper. We disagree with this position. In

view of our prior conclusion that the deceased had accompanied defendant because he displayed a weapon thereby arousing fear for her own safety and that of her children, we do not believe that defendant's argument is proper. We concur with the trial court's conclusion that the deceased was a hostage at the time she justifiably shot the defendant on the expressway. See *People v. Akis* (1976), 63 Ill. 2d 296, 298-99, 347 N.E.2d 733.

Defendant also contends he was not proved guilty of murder beyond a reasonable doubt. Defendant argues that he cannot be convicted of felony-murder because the underlying felony of aggravated kidnapping was not sufficiently proved. Further, defendant maintains that he cannot be convicted of having intentionally killed his wife under sections 9-1(a)(1) or 9-1(a)(2) of the Criminal Code (Ill. Rev. Stat. 1979, ch. 38, pars. 9-1(a)(1) and 9-1(a)(2)) because sufficient evidence was not presented. Our conclusion that defendant was convicted properly of the offense of aggravated kidnapping negates his present claim that a felony-murder conviction would be inappropriate.

In regard to his claim concerning whether he intended to kill his wife, defendant asserts that at best the evidence showed that he was guilty of voluntary manslaughter and that his conviction for aggravated kidnapping had the impermissible effect of elevating a manslaughter conviction to that of murder. We again reject this contention. As the trial court found, the evidence properly established that the deceased had shot the defendant in the jaw with her small caliber derringer pistol while defendant was driving on the expressway. At this time defendant was still armed with a loaded .38-caliber semiautomatic pistol, as demonstrated by the fact that this weapon was taken from him shortly after the shooting. The testimony of the truck driver who approached the deceased's vehicle clearly estab-

lished that a second shot, which fatally wounded the deceased, took place while the car was stopped. The medical evidence, by stipulation, showed that the wound was of a contact nature indicating that the muzzle of the derringer was directly at the deceased's head at the time the weapon was fired, and other evidence established that immediately after the fatal shot occurred defendant was holding the derringer. We believe that the record showed that the deceased lawfully shot the defendant who then stopped the car, wrested control of the weapon from the deceased and placed the gun against her head before firing the fatal shot. Defendant's conviction for murder was proper.

Accordingly, the judgment of the circuit court is affirmed.

Dated at Chicago, Illinois, this 24th day of February, 1982.

ENTER:

William S. White
Justice

Daniel J. McNamara
Justice

Helen McGillicuddy
Justice

APPENDIX D

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, SIXTH DISTRICT

Indictment Number 80-455

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

SAMUEL D. WEATHERS,

Defendant.

MOTION FOR RELIEF UNDER
SECTION 2-1401 Chapter 110
AND ARTICLE 122, CHAPTER 38 I.R.S.
(Filed August 10, 1982)

Now comes defendant SAMUEL D. WEATHERS by his attorney, GEORGE J. MURTAUGH, JR., and in support of his motion for relief states as follows:

1. He stood trial on the charge of murder and aggravated kidnapping and was found guilty by this Court after a trial without a jury.

2. On April 1, 1981 he was sentenced to the minimum penitentiary sentence of 20 years on the charge of murder and 15 years on the charge of aggravated kidnapping.

3. During the trial of this case, Melanie Anewishki was called to testify by the State. During direct examination she testified that she was driving on the Calumet Expressway on the date in question. She state that she observed a Firebird pull off the highway and stop. She

testified that she saw a man whom she identified as the defendant, get out of the car on the drivers side and cross around the car to the passenger side where he thrust his hands into the passenger side window. The witness further testified that she observed John Siorek running down the expressway toward her. Ms. Anewishki approached the vehicle and saw the defendant bleeding. She observed that the defendant had a silver gun in his hand but that it was not the derringer which was the weapon causing the death of the deceased. Anewishki ran past the defendant to Audrey Weathers who was lying on the ground near the passenger side of the vehicle. She checked Audrey's vital signs and concluded that Audrey was dead.

4. The above testimony of Ms. Anewishki was stricken by the Court.

5. Ms. Anewishki's testimony was flatly contradicted by Mr. John Siorek, another state witness. Mr. Siorek testified that he heard a muffled pop as the Firebird passed his truck on the expressway. He observed the brakes lock and the vehicle come to a sliding stop. He then approached the vehicle.

Contrary to Anewishki's testimony and *consistent* with the defendant's testimony, Siorek observed a violent struggle occurring *inside* of the vehicle. He saw the defendant on the passenger side and both the defendant and Audrey Weathers were struggling. Mr. Siorek then heard the second pop. Subsequently, Siorek observed a chrome or shiny gun in Defendant's hand. At this point the state did not elicit from Siorek whether the gun that he saw was the derringer.

On cross-examination, Siorek unequivocally testified that Anewishki did not pull up until after the shooting. She simply could not have observed what she claimed to have

observed in her direct testimony. Siorek never testified that the defendant got out of the car on the driver's side. He did not observe the defendant walk around the car to the passenger side and put his hands in the window. He repeated in his testimony on cross-examination that when he heard the second pop, the defendant and Audrey Weathers were inside of the car on the passenger side of the midst of a violent struggle.

6. This court found the defendant guilty of murder based upon his recollection of Siorek's testimony. The Court found:

He [Siorek] said he saw *both* Weathers outside the passenger side of the automobile. He saw a shiny or silver weapon in the hand of Sam Weathers and he heard another pop. (emphasis add)

Siorek's testimony indicated that the shooting occurred *inside* of the vehicle. Anewishki testified that, defendant was outside of the vehicle at the time of the shooting. However, the judge repeated this confusion at the time of sentencing and indicated that this particular fact was significant in his findings. There the court states:

. . . there is just no way that the testimony of Siorek and the Defendant can be reconciled because Siorek says, in my judgment without contradiction, that Mrs. Weathers was shot outside the automobile.

That the court relied heavily on Siorek's testimony is apparent. However, the court mistakenly concluded that Siorek testified that the defendant and Audrey were outside of the vehicle at the time of the shooting. Because of this, the court concluded that the defendant was not telling the truth. The only witness testifying to facts consistent with this finding was Anewishki, and the court had stricken her testimony. The court's confusion between the testimonies, however, resulted in a finding of murder based upon incompetent testimony.

7. The defendant raised this issue in the trial court and the court erroneously denied the post trial motion.

8. The defendant raised this issue on the Appellate Court. The Rule 23 order issued by that court failed to address that issue and further compound the error when the order also relied on the facts which were stricken from the record when it recited on page 9 of the slip opinion:

We believe that the record showed that the deceased lawfully shot the defendant who then stopped the car, wrested control of the weapon from the deceased and placed the gun against her head before firing the fatal shot. Defendant's conviction for murder was proper.

While there is absolutely no evidence to support the proposition that the defendant wrested the weapon from the deceased, it is apparent that the Appellate Court had to have relied on the stricken testimony of Ms. Anewishki in order to come to that conclusion.

9. The defendant raised the issue again the Illinois Supreme Court by way of a petition for leave to appeal. That petition was denied.

10. The defendant had discovered new evidence in the form of an affidavit by the witness Siorek whose testimony was misunderstood by the trial court. (Exhibit A)

11. A proper understanding of the witness Siorek's testimony would have entitled defendant to a finding of not guilty or at most a finding of guilty of voluntary or involuntary manslaughter because the affidavit recites the facts consistent with the defendant's testimony and directly contrary to the court's finding.

12. The reliance on the stricken evidence of Ms. Anewishki and the misinterpretation of the testimony of John Siorek amounts to a substantial denial of the right of confrontation of witnesses prohibited by the constitutions of the State of Illinois and the United States.

WHEREFORE, the defendant asks for the following relief:

1. That the court stay all proceedings pending disposition of this petition for relief.

2. That the court conduct a hearing to determine the validity of defendant's claim.

3. Pursuant to Section 2-1401 Chapter 110 and Article 122 Chapter 38 I.R.S. an order be entered granting defendant a new trial or in the alternative for any appropriate relief that this Court deems fit and proper.

Respectfully submitted,

/s/ George J. Murtaugh, Jr.

GEORGE J. MURTAUGH, JR.

Attorney for Defendant

SAMUEL D. WEATHERS

George J. Murtaugh, Jr.

Suite 1800

100 West Monroe Street

Chicago, Illinois 60603

(312) 781-0940

State of Illinois

County of Cook--ss.

VERIFICATION

LOUIS B. GARIPPO, being first duly sworn on oath, deposes and states that he has read the foregoing Motion for Relief Under Section 2-1401 Chapter 110 and Article 122, Chapter 38 I.R.S., and that the same is true and correct to the best of my knowledge, information and belief.

/s/ Louis B. Garippo

LOUIS B. GARIPPO

Subscribed and Sworn To

Before Me This 6th Day

of August, 1982.

Patricia A. Jopo

Notary Public

APPENDIX E

Third Division Filed 2-24-82

81-797

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

SAMUEL D. WEATHERS,

Defendant Appellant.

Appeal from the Circuit Court of Cook County.
Honorable Dwight McKay, Judge Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Following a bench trial defendant was convicted of murder and aggravated kidnapping (Ill. Rev. Stat. 1979, ch. 38, pars. 9-1 and 10-3(a)(5)) and received concurrent sentences of 20 and 15 years respectively. On appeal he contends that he was not proved guilty beyond a reasonable doubt of either offense.

The incident in question occurred at approximately 8 a.m. on January 10, 1980. The deceased, Audrey Weathers, had been married for approximately 16 years to defendant. They had 2 teen-age daughters. Extreme marital discord developed over bills, taxes, deceased's job and defendant's drinking, and on the evening of October 13, 1979, a physical altercation occurred between deceased and defendant. As a result of this altercation, the deceased was extensively

beaten by defendant, and she required stitches to close a laceration over one eye. The deceased and the daughters then left the marital home. One daughter related an incident at trial concerning events which occurred on December 1, 1979. She was in a car going to a church when defendant drove by in his vehicle and forced the car to stop. Defendant then dragged her from the car and ordered her to return to the marital home. Defendant left the area as the police arrived, but before he did so he told her that there was going to be a killing.

Both the teen-age daughters testified for the State at trial and described the events shortly before their mother was fatally shot. They explained that the deceased was going to give them a ride to a bus stop where they would then get transportation to their high school. As they exited the house, they were suddenly approached by the defendant who was carrying a gun which was pointed at them. Defendant ordered the deceased and the daughters into the car. Defendant and deceased were in the back seat while the older daughter drove and the other remained in the front passenger seat. During the drive the defendant held the gun toward deceased and behaved in a hysterical manner. Since they could not reach the bus stop in time, the deceased suggested that the girls drive to the high school. There they left the car with the admonition of the defendant that they not report the matter to anyone. Defendant then got into the front seat of the car and drove away with deceased who had gotten into the front passenger seat.

Other witnesses for the State established the following scenario of events after the daughters went into the school. Defendant drove the deceased's vehicle onto an expressway. A truck driver, who was parked on the side of the roadway attending his disabled vehicle, saw the car drive

past and heard a muffled pop. He then saw the car brake suddenly and come to a stop. As he approached the deceased's vehicle, he saw defendant and deceased struggling on the passenger side of the car. He then heard a second popping sound and saw defendant holding a gun. Defendant then backed away from the deceased, who was lying on the ground, and said, "Damn."

Another motorist on the expressway noted a peculiarity in the traffic pattern and saw the deceased's vehicle. She stopped her car, got out and saw the deceased lying on the ground. At that time she also saw the defendant who was bleeding from the right part of his jaw. Defendant was holding a gun which he later threw to the ground. He appeared agitated. This witness examined the deceased and was unable to detect any signs of life. The witness specifically recalled that at this time the defendant said, "Good, the bitch is dead." This witness was, however, uncertain whether the defendant then continued by stating, "She needs to be dead."

Another motorist, who was a federal probation officer, stopped at the scene of the shooting. He saw the deceased lying on the ground, and he later took a .38-caliber automatic pistol from the defendant. An investigating police officer arrived at the scene shortly after the incident occurred. He saw defendant and apparently the probation officer near a guard rail. Defendant told this officer, "She shot me and I shot her." At this point defendant was arrested. A state trooper, who also arrived at the scene, testified that she saw the deceased lying on the ground and bloodstains in the car. A 22-caliber derringer was laying on the ground near the deceased's head. One live round of .38-caliber ammunition was also found on the ground nearby. The trooper then saw the defendant in handcuffs with another police officer who was administering aid to the defendant. This trooper was given defendant's .38-caliber automatic pistol.

There was a stipulation concerning the fact that the deceased had died from a gunshot wound to the brain and that the entry wound was of a contact nature indicating that the gun was right to her head when it was fired. There was a further stipulation that the fatal bullet was fired from the .22-caliber derringer recovered from the scene of the shooting. The weapon at that time contained 2 expended shells. The record further shows that this weapon belonged to deceased and she apparently had it in her possession on the morning of the shooting.

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speaking to the deceased about the college his daughters would attend when deceased without warning shot him in the jaw with the derringer, and he stopped the car. At that point a struggle ensued in the vehicle, and defendant claimed that he fell partially out of the deceased's car. The gun then again discharged. Defendant denied ever having the derringer in his hand. Rather, he said that the deceased held the gun. Defendant claimed that he did not intend to kill the deceased or to kidnap her or his children. Defendant was unable to explain how the derringer went off the second time.

In announcing its findings, the trial court concluded that defendant had kidnapped the deceased and his children. The court further found that the deceased had a right, as a hostage, to shoot the defendant. Further, the trial court stated that it did not give any credence to defendant's testimony concerning the tragic events, and the court concluded that the defendant had murdered the deceased with her own weapon.

Defendant now contends that these conclusions were erroneous. Defendant initially maintains that there was a lack of evidence that the deceased had been kidnapped. Specifically, defendant asserts that the evidence is insufficient to show that she was confined against her will, and secondly that that confinement was secret. He maintains that initially he may have committed an aggravated assault but that at some subsequent time deceased voluntarily agreed to accompany him. If his conclusion is correct, defendant argues that a felony-murder conviction based on aggravated kidnapping could not be proper.¹

¹ Defendant was charged with 2 counts of murder (Ill. Rev. Stat. 1979, ch. 38, pars. 9-1(a)(1) and 9-1(a)(2) and one count of felony-murder, based on aggravated kidnapping (par. 9-1(a)(3)). It is unclear of what count(s) the trial court convicted defendant.

The trial court obviously believed the testimony of the defendant's teen-aged daughters which established that the defendant accosted them with a gun that he pointed at them and that he then ordered them into the deceased's car. While in the car, the defendant held the weapon pointed at the deceased. We reject the defendant's position that the deceased did not attempt to escape when they first entered the car or when their daughters arrived at school thereby suggesting that her continued presence with defendant was voluntary. She was confronted by the defendant who, in the recent past, had exhibited violent behavior not only toward her but to one of their children. Defendant was armed, and it is obvious that the deceased wanted to safeguard her children by having them reach school without the possibility of violence being inflicted upon them by defendant. The fact that the deceased waited until her children were safe before she shot the defendant further supports our conclusion that any resistance or attempt to escape on the part of the deceased prior thereto was done to safeguard her daughters. The evidence amply demonstrates that the deceased was confined against her will. (See *People v. Owens* (1971), 133 Ill. App. 2d 44, 47, 272 N.E.2d 858.) Further, the fact that the deceased was confined in an automobile does not detract from the conclusion that such confinement was secret. *People v. Harris* (1979), 68 Ill. App. 3d 12, 14, 385 N.E. 2d 789.

Defendant also states the asportation of the deceased was not relevant to the shooting because the trial court concluded that the abduction of the deceased and the children prior to their arrival at school was not crucial. Defendant contends that, after the children were let out of the vehicle, the deceased agreed to accompany him. Thus, defendant maintains that the aggravated kidnapping conviction was improper. We disagree with this position. In

view of our prior conclusion that the deceased had accompanied defendant because he displayed a weapon thereby arousing fear for her own safety and that of her children, we do not believe that defendant's argument is proper. We concur with the trial court's conclusion that the deceased was a hostage at the time she justifiably shot the defendant on the expressway. See *People v. Akis* (1976), 63 Ill. 2d 296, 298-99, 347 N.E.2d 733.

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In regard to his claim concerning whether he intended to kill his wife, defendant asserts that at best the evidence showed that he was guilty of voluntary manslaughter and that his conviction for aggravated kidnapping had the impermissible effect of elevating a manslaughter conviction to that of murder. We again reject this contention. As that the deceased had shot the defendant in the jaw with her small caliber derringer pistol while defendant was driving on the expressway. At this time defendant was still armed with a loaded .38-caliber semiautomatic pistol, as demonstrated by the fact that this weapon was taken from him shortly after the shooting. The testimony of the truck driver who approached the deceased's vehicle clearly established that a second shot, which fatally wounded the de-

ceased, took place while the car was stopped. The medical evidence, by stipulation, showed that the wound was of a contact nature indicating that the muzzle of the derringer was directly at the deceased's head at the time the weapon was fired, and other evidence established that immediately after the fatal shot occurred defendant was holding the derringer. We believe that the record showed that the deceased lawfully shot the defendant who then stopped the car, wrested control of the weapon from the deceased and placed the gun against her head before firing the fatal shot. Defendant's conviction for murder was proper.

Accordingly, the judgment of the circuit court is af-

Dated at Chicago, Illinois, this 24th day of February, 1982.

ENTER:

William S. White
Justice

Daniel J. McNamara
Justice

Helen McGillicuddy
Justice

APPENDIX F

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, SIXTH DISTRICT

Indictment Number 80-455

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Plaintiff,

v.

SAMUEL D. WEATHERS,

Defendant.

MOTION FOR RELIEF UNDER
SECTION 2-1401 Chapter 110
AND ARTICLE 122, CHAPTER 38 I.R.S.

(Filed August 10, 1982)

Now comes defendant SAMUEL D. WEATHERS by his attorney, GEORGE J. MURTAUGH, JR., and in support of his motion for relief states as follows:

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2. On April 1, 1981 he was sentenced to the minimum penitentiary sentence of 20 years on the charge of murder and 15 years on the charge of aggravated kidnapping.

3. During the trial of this case, Melanie Anewishki was called to testify by the State. During direct examination she testified that she was driving on the Calumet Expressway on the date in question. She state that she

observed a Firebird pull off the highway and stop. She testified that she saw a man whom she identified as the defendant, get out of the car on the drivers side and cross around the car to the passenger side where he thrust his hands into the passenger side window. The witness further testified that she observed John Siorek running down the expressway toward her. Ms. Anewishki approached the vehicle and saw the defendant bleeding. She observed that the defendant had a silver gun in his hand but that it was not the derringer which was the weapon causing the death of the deceased. Anewishki ran past the defendant to Audrey Weathers who was lying on the ground near the passenger side of the vehicle. She checked Audrey's vital signs and concluded that Audrey was dead.

4. The above testimony of Ms. Anewishki was stricken by the Court.

5. Ms. Anewishki's testimony was flatly contradicted by Mr. John Siorek, another state witness. Mr. Siorek testified that he heard a muffled pop as the Firebird passed his truck on the expressway. He observed the brakes lock and the vehicle come to a sliding stop. He then approached the vehicle.

Contrary to Anewishki's testimony and *consistent* with the defendant's testimony, Siorek observed a violent struggle occurring *inside* of the vehicle. He saw the defendant on the passenger side and both the defendant and Audrey Weathers were struggling. Mr. Siorek then heard the second pop. Subsequently, Siorek observed a chrome or shiny gun in Defendant's hand. At this point the state did not elicit from Siorek whether the gun that he saw was the derringer.

On cross-examination, Siorek unequivocally testified that Anewishki did not pull up until after the shooting. She simply could not have observed what she claimed to have

observed in her direct testimony. Siorek never testified that the defendant got out of the car on the driver's side. He did not observe the defendant walk around the car to the passenger side and put his hands in the window. He repeated in his testimony on cross-examination that when he heard the second pop, the defendant and Audrey Weathers were inside of the car on the passenger side of the midst of a violent struggle.

6. This court found the defendant guilty of murder based upon his recollection of Siorek's testimony. The Court found:

He [Siorek] said he saw *both* Weathers outside the passenger side of the automobile. He saw a shiny or silver weapon in the hand of Sam Weathers and he heard another pop. (emphasis add)

Siorek's testimony indicated that the shooting occurred *inside* of the vehicle. Anewishki testified that, defendant was outside of the vehicle at the time of the shooting. However, the judge repeated this confusion at the time of sentencing and indicated that this particular fact was significant in his findings. There the court states:

... there is just no way that the testimony of Siorek and the Defendant can be reconciled because Siorek says, in my judgment without contradiction, that Mrs. Weathers was shot outside the automobile.

That the court relied heavily on Siorek's testimony is apparent. However, the court mistakenly concluded that Siorek testified that the defendant and Audrey were outside of the vehicle at the time of the shooting. Because of this, the court concluded that the defendant was not telling the truth. The only witness testifying to facts consistent with this finding was Anewishki, and the court had stricken her testimony. The court's confusion between the testimonies, however, resulted in a finding of murder based upon incompetent testimony.

7. The defendant raised this issue in the trial court and the court erroneously denied the post trial motion.

8. The defendant raised this issue on the Appellate Court. The Rule 23 order issued by that court failed to address that issue and further compound the error when the order also relied on the facts which were stricken from the record when it recited on page 9 of the slip opinion:

We believe that the record showed that the deceased lawfully shot the defendant who then stopped the car, wrested control of the weapon from the deceased and placed the gun against her head before firing the fatal shot. Defendant's conviction for murder was proper.

While there is absolutely no evidence to support the proposition that the defendant wrested the weapon from the deceased, it is apparent that the Appellate Court had to have relied on the stricken testimony of Ms. Anewishki in order to come to that conclusion.

9. The defendant raised the issue again the Illinois Supreme Court by way of a petition for leave to appeal. That petition was denied.

10. The defendant had discovered new evidence in the form of an affidavit by the witness Siorek whose testimony was misunderstood by the trial court. (Exhibit A)

11. A proper understanding of the witness Siorek's testimony would have entitled defendant to a finding of not guilty or at most a finding of guilty of voluntary or involuntary manslaughter because the affidavit recites the facts consistent with the defendant's testimony and directly contrary to the court's finding.

12. The reliance on the stricken evidence of Ms. Anewishki and the misinterpretation of the testimony of John Siorek amounts to a substantial denial of the right of confrontation of witnesses prohibited by the constitutions of the State of Illinois and the United States.

WHEREFORE, the defendant asks for the following relief:

1. That the court stay all proceedings pending disposition of this petition for relief.

2. That the court conduct a hearing to determine the validity of defendant's claim.

3. Pursuant to Section 2-1401 Chapter 110 and Article 122 Chapter 38 I.R.S. an order be entered granting defendant a new trial or in the alternative for any appropriate relief that this Court deems fit and proper.

Respectfully submitted,

/s/ *George J. Murtaugh, Jr.*

GEORGE J. MURTAUGH, JR.

Attorney for Defendant

SAMUEL D. WEATHERS

George J. Murtaugh, Jr.

Suite 1800

100 West Monroe Street

Chicago, Illinois 60603

(312) 781-0940

State of Illinois

County of Cook—ss.

VERIFICATION

LOUIS B. GARIPPO, being first duly sworn on oath, deposes and states that he has read the foregoing Motion for Relief Under Section 2-1401 Chapter 110 and Article 122, Chapter 38 I.R.S., and that the same is true and correct to the best of my knowledge, information and belief.

/s/ *Louis B. Garippo*

LOUIS B. GARIPPO

Subscribed and Sworn To

Before Me This 6th Day

of August, 1982.

Patricia A. Jopo

Notary Public

APPENDIX G

THIRD DIVISION

March 7, 1984

82-2722

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

SAMUEL WEATHERS,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.

Honorable Dwight McKay, Judge Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Following a bench trial defendant was convicted of murder and aggravated kidnapping and sentenced to concurrent terms of 20 and 15 years respectively. On direct appeal this court affirmed pursuant to Supreme Court Rule 23 (*People v. Weathers* (1982), 104 Ill. App. 3d 1207), and the supreme court denied leave to appeal (91 Ill. 2d 565). Thereafter defendant filed a petition under section 2-1401 of the Code of Civil Procedure and the Post Conviction Hearing Act. (Ill. Rev. Stat. 1981, ch. 110, par. 2-1401, and ch. 38, par. 122-1 *et seq.*)¹ The trial court denied the peti-

¹ Defendant was released on bond at the time this petition was filed and apparently had not yet begun to serve his sentence. We question whether resort to post-conviction relief was therefore premature. Ill. Rev. Stat. 1981, ch. 38, par. 122-1; see generally the discussion in *People v. Montes* (1980), 90 Ill. App. 3d 355, 412 N.E.2d 1363.

tion after a nonevidentiary hearing, and defendant has appealed challenging the trial court's ruling on that petition.

Defendant argues that he was entitled to an evidentiary hearing on his petition: defendant places principal reliance on the post-trial affidavit secured from John Siorek, a witness to the fatal shooting of defendant's wife.

Reference to certain facts contained in our prior dispositional order are necessary to resolution of defendant's contention. The evidence showed that defendant and his wife (deceased) were separated after defendant beat her. Approximately 40 days before the fatal shooting, defendant told one of his daughters that someone was going to be killed.

On the morning of January 10, 1980, defendant abducted deceased and their two daughters at gunpoint and drove the daughters to their school. He then drove away with deceased. It is undisputed that while defendant was driving, deceased pulled out her own small caliber two-shot pistol and fired one shot at defendant, striking him in the mouth. Defendant then suddenly braked the car and brought it to a stop on the shoulder of the road. A second fatal shot from deceased's gun was fired at this time into deceased's head while the gun was in contact with her head.

At this point John Siorek, who was also on the shoulder of the road because his vehicle was disabled, approached the car. In our Rule 23 disposition we described his other testimony as follows:

"As he approached the deceased's vehicle, he saw defendant and deceased struggling on the passenger side of the car. He then heard a second popping sound and saw defendant holding a gun. Defendant then

backed away from the deceased, who was lying on the ground, and said, 'Damn.' "

Another witness who arrived at the scene shortly after the shooting recalled that defendant said, "She shot me and I shot her." In affirming defendant's murder conviction, we concluded "that the record showed that the deceased lawfully shot the defendant who then stopped the car, wrested control of the weapon from the deceased and placed the gun against her head before firing the fatal shot."

In his collateral attack defendant questions the correctness of the trial court's ruling on his petition and our review of the record. Defendant refers to the trial court's factual evaluation that deceased was outside her car when she was shot as evidence of his claim that this was the basis upon which the trial court rejected his credibility. In an affidavit secured by defendant from John Siorek, he averred that defendant and deceased were struggling inside the car when the second shot was fired.²

Defendant also asserts that this court relied on the testimony of another witness, Melanie Anewishki. Though not recited in our prior dispositional order, she testified she saw defendant get out of the driver's side of the vehicle, go to the passenger's side and thrust his hands into the car. With the exception of a statement made by defendant to this witness, the trial court said that it "disregarded" her testimony. To this extent we only recited her testimony in general in order to set the context of defendant's statement to her. For defendant to suggest that this court relied inappropriately upon testimony not recited in our dispositional order is unwarranted. See

² Defendant admits that Siorek's trial testimony is not necessarily inconsistent with his affidavit.

Gannon v. Chicago, Milwaukee, St. Paul and Pacific Railway Co. (1961), 22 Ill. 2d 305, 316, 175 N.E.2d 785.

In any event we do not find any basis raised by Siorek's affidavit to disturb defendant's convictions. Irrespective of where deceased was shot our review of the record does not require a different result concerning defendant's guilt. We further believe that defendant's testimony concerning his lack of knowledge of how deceased was shot was incredulous particularly when defendant admitted shortly after the shooting that he had shot his wife after she had shot him. Defendant has basically combed the record for some point upon which to attack the totally justified finding of the trial court. While defendant may have found an evidentiary factor erroneously recited by the trial court, this factor was minor and does not dispel the compelling conclusion that defendant murdered his wife after she resisted him during the kidnapping. The trial court did not err in denying post-conviction or other collateral relief without an evidentiary hearing.

We affirm the judgment of the circuit court and grant the State's request that defendant be assessed \$50 as costs for this appeal.

McNAMARA, O'CONNOR, JR., WHITE, J.J.

APPENDIX H

ILLINOIS SUPREME COURT

Julcann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62708
(217) 782-2035

June 5, 1984

Mr. Carl M. Walsh
Attorney at Law
39 S. LaSalle, S#920
Chicago, IL 60603

No. 59996—People State of Illinois, respondent, vs. Samuel D. Weathers, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today *Denied* the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 27, 1984.

APPENDIX I

State of Illinois
County of Cook—ss.

AFFIDAVIT

I, JOHN SIOREK, being first duly sworn on oath depose and state the following:

On January 10, 1980 I was a truck driver employed by White Eagle Baker Supply. In the morning hours my truck was immobilized and I was parked on the Calumet Expressway in the vicinity of 159th Street.

I saw a white Firebird pass my truck and I heard a popping noise. The auto skidded to a stop ahead of my truck. As I approached the auto I observed a man and woman struggling on the passenger's and driver's side of the auto. The struggle occurred inside the vehicle. I then saw the man outside of the auto still struggling when I heard a second pop. The woman was still in the auto and both the man and woman were still struggling with their hands. I never saw the man leave the auto from the driver's side to walk around to the passenger side. The struggling with the hands was never interrupted.

It is entirely possible that the man could have fallen out of the passenger door during this struggle.

I testified in the case of *People v. Samuel Weathers*.

Further affiant sayeth not.

/s/ John E. Siorek

JOHN SIOREK

Subscribed and sworn to
Before Me This 28th Day
of June, 1982.

/s/ Mary A. Dietmeyer

Notary Public

EXHIBIT A

APPENDIX J

81-797

In regard to his claim concerning whether he intended to kill his wife, defendant asserts that at best the evidence showed that he was guilty of voluntary manslaughter and that his conviction for aggravated kidnapping had the impermissible effect of elevating a manslaughter conviction to that of murder. We again reject this contention. As the trial court found, the evidence properly established that the deceased had shot the defendant in the jaw with her small caliber derringer pistol while defendant was driving on the expressway. At this time defendant was still armed with a loaded .38-caliber semiautomatic pistol, as demonstrated by the fact that this weapon was taken from him shortly after the shooting. The testimony of the truck driver who approached the deceased's vehicle clearly established that a second shot, which fatally wounded the deceased, took place while the car was stopped. The medical evidence, by stipulation, showed that the wound was of a contact nature indicating that the muzzle of the derringer was directly at the deceased's head at the time the weapon was fired, and other evidence established that immediately after the fatal shot occurred defendant was holding the derringer. We believe that the record showed that the deceased lawfully shot the defendant who then stopped the car, wrested control of the weapon from the deceased and placed the gun against her head before firing the fatal shot. Defendant's conviction for murder was proper.

